U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 12 April 2004

BALCA Case No.: 2003-INA-46
ETA Case No.: P2000-CA-09508616/VA

In the Matter of:

PROFESSIONAL STAFFING SERVICES OF AMERICA,
Employer,

on behalf of

CEREDETTE VILLANUEVA,
Alien.

Certifying Officer: Martin Rios
San Francisco, CA

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification[1] filed by a professional staffing company for the position of Social Service Director. (AF 42-43).[2] The following decision is based on the record upon which the Certifying Officer ("CO") denied certification and the Employer's request for review, as contained in the Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. § 656.27(c).

[1] Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

[2] "AF" is an abbreviation for "Appeal File".

STATEMENT OF THE CASE

On February 29, 2000, Professional Staffing Services of America ("the Employer") filed an application for alien labor certification on behalf of the Alien, Ceredette Villanueva, to fill the position of Social Service Director. The minimum requirement for the position was listed as a Bachelor's degree in Psychology/Social Service. (AF 42-43). The Employer received eight applicant referrals in response to its recruitment efforts, all of whom were rejected as either not interested or not qualified for the position. (AF 46-49).

The CO issued a Notice of Findings ("NOF") on July 18, 2002, proposing to deny labor certification based upon a finding that the bona fide job opportunity was questionable and the Employer had rejected two qualified U.S. workers for other than lawful, job-related reasons. (AF 37-40). The Employer was asked to submit documentation that a full-time job opening currently exists and to document that Applicants #1 and #2 were rejected solely for lawful, job-related reasons. Noting that Applicant #1 holds a Bachelors of Arts degree in sociology and was rejected for lack of knowledge of the position, the CO instructed the Employer to document a lawful, job-related reason for rejecting this applicant. The CO similarly requested the Employer to document good faith in the recruitment of Applicant #2, as she was determined to be qualified after the first interview yet rejected as uninterested when the Employer failed to contact her for a second interview. (AF 38-39).

In Rebuttal dated August 20, 2002, the Employer documented the existence of a bona fide job opportunity. (AF 7-36). With respect to Applicant #1, the Employer stated that an additional basis for rejection was that she was not interested in the position, as it required occasional travel to the Employer's other facility location. The Employer stressed that Applicant #2 was considered for the job but was no longer available. (AF 8).

The CO issued a Final Determination ("FD") denying labor certification on October 10, 2002, based upon a finding that the Employer had failed to adequately document lawful rejection of U.S. Applicant #1. (AF 5-6). The CO noted that the Employer had raised a new reason for rejection not cited in the Employer's initial recruitment statement. The CO found this new reason, the applicant's disinterest in travel as part of the position, both unpersuasive and unlawful. The CO discounted the Employer's new basis for rejection, noting that the Employer had earlier indicated rejection because the applicant lacked knowledge of the position. In addition, the CO observed that neither the ETA 750A nor the advertisement reflected travel to another facility as a requirement for the position and the Employer cannot reject U.S. applicants for undisclosed requirements. (AF 6).

The Employer filed a Request for Review by letter dated November 7, 2002 and the matter was docketed in this Office on December 24, 2002. (AF 1).

DISCUSSION

Twenty C.F.R. § 656.21(b)(6) provides that U.S. workers applying for a job opportunity offered to an alien may be rejected solely for lawful job related reasons. Twenty C.F.R. § 656.24(b)(2)(ii) states that the CO shall consider a U.S. worker able and qualified for the job opportunity if the worker, by education, training, experience, or a combination thereof, is able to perform in the normally acceptable manner, the duties involved in the occupation as customarily performed by other workers similarly employed.

An employer must state all the requirements for the petitioned position on the ETA 750A application and if an applicant meets the requirements as stated by the employer, he or she is deemed qualified for the job. *Bell Communications Research, Inc.,* 1988-INA-26 (Dec. 22 1988) (*en banc*). Labor certification is properly denied where an employer unlawfully rejects workers who meet stated minimum education and experience requirements. *ABC Home Video Corp.,* 1993-INA-480 (Nov. 16, 1994);

Banque Francaise Du Commerce Exterieur, 1993-INA-44 (Dec. 7, 1993); *American Café,* 1990-INA-26 (Jan 23, 1991).

In the instant case, the Employer has failed to demonstrate lawful, job-related reasons for the rejection of Applicant #1. The Employer initially rejected Applicant #1 as unqualified because she had "no knowledge of the job description," even though she met the Employer's educational requirements. (AF 47). The CO correctly considered Applicant #1 qualified for the position. The Employer's assertion that she was not qualified, despite her compliance with the minimum stated requirements, was unfounded. The Employer did not require familiarity with the job description, only a degree in a related field. The Employer's rejection on the basis of lack of knowledge was therefore unlawful.

The Employer then stated that the applicant was rejected because she was not interested in the required travel between facilities. (AF 8). Nowhere on the ETA 750A form or the job advertisement was there any indication that travel is required for this position. Rejection of an otherwise qualified U.S. applicant for failure to meet an undisclosed requirement is unlawful. *Jeffrey Sandler, M.D.*, 1989-INA-316 (Feb. 11, 1991) (*en banc*); *Chromato Chem*, 1988-INA-8 (Jan. 12, 1989) (*en banc*). Thus, neither of the Employer's stated basis for rejection was a lawful, job-related reason and as such, labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW, Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.